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Nos. 07-1125

IN THE SUPREME COURT OF THE UNITED STATES

LISA RYAN FITZGERALD AND
ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND
RUSSELL DEVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (the "ABA"), as *amicus curiae,* respectfully submits this brief in support of Petitioners. The ABA asks this Court to hold that constitutional claims that can be brought under Section 1983, 42 U.S.C. § 1983, for violation of the Equal Protection Clause are not preempted or otherwise limited by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae,* or its members, or counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are on file with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief.

The ABA's Constitution states, "The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government." The ABA believes that the issue now before the Court, which is whether claims for violation of the Equal Protection Clause which could have been brought under Section 1983 prior to the enactment of Title IX can no longer be brought because of the enactment of Title IX, presents a critical question of how the courts are to assess congressional intent in defending constitutional rights, and thus, goes to the heart of representative government.

The ABA has long supported vigorous enforcement of Title IX. In August 1975, the ABA adopted a policy urging:

> [T]he prompt, vigorous, and effective implementation and enforcement of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq., which promotes equal educational opportunity without regard to sex, to the full extent of the powers granted in the statute.

Consistently since adopting this policy, the ABA has actively supported the right of women and girls to protection from discrimination in education and advocated passage of related civil rights legislation that would augment those protections. The ABA's record of dedicated advocacy supporting equal opportunity for women and girls in public education is not only consistent with, but provides the critical foundation for, the ABA's commitment to equal opportunity for women in the legal profession.

This brief was not circulated to any member of the Judicial Division Council prior to its filing.

Since the enactment of Title IX in 1972, there has been a dramatic increase in the number of women in law schools. In 1971-72, the last academic year before the passage of Title IX, there were 8,567 women enrolled as J.D. candidates in ABA-accredited law schools—9.4% of the total enrollment of 91,225. In 2007-08, there were eight times that many women enrolled as J.D. candidates in ABA-accredited law schools—66,196 women, representing 46.7% of the total enrollment of 141,719.[3] The rate of attrition of women enrolled as J.D. candidates is slightly lower than that of men.[4]

While there is much that remains to be done in ensuring equality in the profession, that growth of women in law schools has been the foundation for a substantial increase in the number of women in the profession and the judiciary. As of 2007, women represent 30.1% of this country's lawyers, 162 women (24% of the total) serve as federal district judges, 42 women (25.1% of the total) serve as federal circuit court judges, and 106 women (30.4% of the total) serve as judges on the state courts of last resort, 19 whom are chief justices of those courts.[5]

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[3] ABA, Legal Education Statistics, First Year and Total J.D. Enrollment by Gender, http://www.abanet.org/legaled/statistics/stats.html (visited August 27, 2008).

[4] In 2006-07, the last year for which such statistics are available, 2,896 of the 66,085 women (4.4%) and 3,591 of the 74,946 men (4.8%) enrolled in ABA-accredited law schools withdrew as students. ABA, Legal Education Statistics, Total Male J.D. Attrition, Total Female J.D. Attrition, http://www.abanet.org/legaled/statistics/stats.html (visited August 27, 2008).

[5] ABA, Commission on Women in the Legal Profession, A Current Glance at Women in the Law 2007,

The ABA believes that congressional intent in passing Title IX was to strengthen, and not limit, enforcement of the constitutional right to equal protection under the law. The ABA therefore respectfully submits this brief, as it may assist the Court.

SUMMARY OF ARGUMENT

Prior to the enactment of Title IX, persons who were subject to sex discrimination in public schools had the right to file claims under Section 1983 alleging that such discrimination violated their rights under the Equal Protection Clause of the Fourteenth Amendment. In enacting Title IX, Congress established additional rights and remedies redressing sex discrimination by federally-funded educational institutions.

When Congress did so, there was already a well-developed body of law concerning Title VI, which addresses discrimination on the basis of race, color or national origin. As shown by the legislative history of Title IX, Congress intended remedies under Title IX to parallel those of Title VI. The lower courts, further, had recognized that statutory remedies for violations of Title VI supplemented rather than superseded Section 1983 remedies for constitutional violations arising out of the same operative facts.

In the case below, the First Circuit concluded that "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions," *Fitzgerald v. Barnstable School*

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http://www.abanet.org/women/womenstatistics.html (visited August 27, 2008).

Committee, 504 F.3d 165, 179 (1st Cir. 2007). The use of Section 1983 remedies to enforce rights, however, should not be precluded by "repeal by implication" where the rights at issue are constitutional rights that existed prior to the enactment of Title IX, and not statutory rights that were newly created by Title IX.

Under this Court's jurisprudence, repeal by implication should only be found if the two statutes in question "cannot mutually coexist" because of a "positive repugnancy" or an "irreconcilable conflict" between their provisions. Because there is no "irreconcilable conflict" between (a) the rights and remedies of Title IX and (b) the rights of the Equal Protection Clause and the remedies provided by Section 1983, they can and should "mutually co-exist", especially where the administrative scheme of Title IX is insufficient for protection of constitutional rights.

ARGUMENT

The history of Section 1983 as well as the language, statutory scheme, and history of Title IX make clear that when Congress enacted Title IX, it did not intend to deprive persons of rights that they possessed before the enactment of Title IX. These rights included the right to file claims under Section 1983 for violations of the Equal Protection Clause of the Fourteenth Amendment. The lower court's contrary decision should be reversed.

A. CONGRESS ENACTED SECTION 1983 AS REMEDIAL LEGISLATION TO PROVIDE FOR PRIVATE ENFORCEMENT OF FOURTEENTH AMENDMENT RIGHTS.

"Title 42 U.S.C. § 1983 derives from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, entitled, 'An

Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.'" *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 203 (1970). This Act provided a private remedy in federal court to individuals left unprotected by state governments in the American South of the Reconstruction era.

As summarized by the Court in *Mitchum v. Foster*, 407 U.S. 225, 242 (1972),

> Th[e] legislative history [of the Civil Rights Act of 1871] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights.

Congress enacted Section 1983 "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Hafer v. Melo*, 502 U.S. 21, 28 (1991) (citations omitted). At the time, the Civil Rights Act of 1871 represented "the only civil remedy for Fourteenth Amendment violations." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978).

As the statements of the Act's proponents show, Congress set out to create a remedy with the broadest possible scope to empower persons to enforce their equal protection rights under the Fourteenth Amendment. For Representative Hoar, equal protection was the centerpiece of the Act. As

he put it, "[t]he principal danger that menaces us today is from the effort within the States to deprive considerable numbers of persons of the civil and equal rights which the General Government is endeavoring to secure to them." Cong. Globe, 42d Cong., 1st Sess. App. 335 (1871).

Representative Garfield emphasized the equal protection problem which Congress sought to correct: "even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." Cong. Globe, 42d Cong., 1st Sess. App. 153 (1871).

In *Owen v. City of Independence*, 445 U.S. 622, 635-636 (1980), the Court relied on the legislative history of the Act to emphasize its broad scope, noting that Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the Act was to receive:

> I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent

> with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871).

As the Court stated, "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. at 238-239. This federal remedy "reflects a congressional judgment that a 'damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.' As remedial legislation, § 1983 is to be construed generously to further its primary purpose." *Gomez v. Toledo*, 446 U.S. 635, 638-639 (1980) (citations omitted).

Because Section 1983 encompasses rights secured by the Constitution *and* laws, its breadth of construction is greater than was afforded to Section 1 of the Civil Rights Act of 1871 (which was limited to rights secured by the Constitution). Because Congress has not acted to limit Section 1983, both its breadth and ongoing legacy should be preserved.

B. CONGRESS ENACTED TITLE IX TO EXPAND—AND NOT TO LIMIT—THE RIGHTS AND REMEDIES AVAILABLE TO REDRESS SEX DISCRIMINATION BY FEDERALLY-FUNDED EDUCATIONAL INSTITUTIONS

In the decision presently before the Court, the First Circuit concluded, "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by

educational institutions." *Fitzgerald,* 504 F.3d at 179. The history of Title IX does not support this conclusion.

1. When Congress Enacted Title IX, There Was A Well-Developed Body of Law Concerning Title VI, Which Had Established That Title VI Did Not Preclude Use of Section 1983.

When Title IX was enacted in 1972, there was an existing, well-developed body of law concerning Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.[6] Under this body of law, courts had permitted claims under Section 1983 to redress constitutional equal protection violations, even where the subject matter of those claims was encompassed within Title VI.

For example, in *Cypress v. Newport News Gen. and Nonsectarian Hosp. Ass'n,* 375 F.2d 648, 659-60 (4th Cir. 1967), in granting an injunction under Section 1983 to enjoin the race-based refusal of admission of a physician to a hospital staff, the Fourth Circuit rejected the hospital's argument that no remedy should be available under Section 1983 because of the breadth of Title VI, holding "[t]he court need not at this stage accept the appellees' suggestion and put its reliance in such undependable means of effectuating the plainly established constitutional rights of the plaintiffs." See also *Kelley v. Altheimer, Ark. Pub. School Dist. No. 22,*

[6] Title VI of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

378 F.2d 483 (8th Cir. 1967) (where school district had submitted desegregation plan under Title VI, injunction was granted under Section 1983 to enjoin discriminatory conduct, including construction of schools that would promote segregation in violation of equal protection); *Smith v. Board of Ed. of Morrilton School Dist. No. 32,* 365 F.2d 770 (8th Cir. 1966) (in an opinion by then-Judge Blackmun, upon a Section 1983 claim, holding that school board's established consolidation policy of dismissing teaching staff of closed school when other openings were not available at time of closing could not be applied to Negro teachers of all-Negro school which was closed pursuant to Title VI desegregation plan); *Marable v. Alabama Mental Health Bd.,* 297 F. Supp. 291 (M.D. Ala. 1969) (in consolidated cases based on same operative facts relating to segregation of state mental health system, three-judge district court granted individuals relief under Section 1983, and denied state relief challenging actions of Secretary of Health, Education and Welfare withdrawing federal funds under Title VI).

In each of these cases, Title VI had not precluded Section 1983 claims to vindicate constitutional rights —as the First Circuit has held in this case with respect to Title IX—and each court had granted relief under Section 1983.

It was against this background that Congress enacted Title IX. In fact, Congress "modeled Title IX after Title VI of the Civil Rights Act of 1964", *Gebser v. Lago Vista Indep. School Dist.,* 524 U.S. 274, 286 (1998). As the Court stated in *Cannon v. Univ. of Chicago,* 441 U.S. 667 (1979):

> Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two

> statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.

441 U.S. at 694-696 (footnotes omitted).

The legislative history of Title IX shows that Congress intended Title IX to afford remedies that were parallel to those of Title VI. Senator Birch Bayh, Title IX's sponsor, lauded the remedies available to redress violations of Title VI, which he said had "operated with great success," and stated that such remedies "would be equally applicable to discrimination" prohibited by Title IX. 117 Cong. Rec. 30408 (1971).

The lower courts had, at that time, recognized that statutory remedies for violations of Title VI supplemented rather than superseded Section 1983 remedies for constitutional violations arising out of the same operative facts, and had also recognized that claims of sex discrimination in violation of the Equal Protection Clause could be brought under Section 1983. Congress therefore would have expected the same parallel remedies to be available for discrimination that violated both Title IX and the Equal Protection Clause. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (in assessing Congress's intent, "we evaluate the state of the law when the Legislature passed Title IX").

In enacting Title IX, Congress intended, as Sen. Bayh stated, to "expand some of our basic civil rights and labor laws". 118 Cong. Rec. 5804 (1972). The First Circuit's decision in this case, instead, would require a determination that Congress enacted a

new, untested law, with limited applicability, narrow administrative remedies and no explicit judicial remedies, with the intent that the well-established remedies under Section 1983 would no longer be available to vindicate constitutional rights. It would also require the conclusion that a public school that received federal funding would not be subject to remedies under Section 1983 unless it lost that funding because of a Title IX violation. The First Circuit's decision also ignores the fact that Title IX has statutory exceptions—*e.g.*, Title IX does not apply to military academies, or to admissions to elementary schools and high schools, 20 U.S.C. § 1681(a)(1) (4)—that make it narrower in scope than the Equal Protection Clause.

If, on the other hand, Title IX does not preclude the use of Section 1983 to redress pre-existing constitutional rights, then Section 1983 would be available to vindicate rights under the Equal Protection Clause in all public schools, regardless of funding, and Title IX would provide additional protections to vindicate Title IX rights in those schools that receive federal funds, resulting in a far more consistent approach to the administration of the laws.

2. Section 1983 Remedies To Protect Constitutional Rights Should Not Be Precluded By A "Repeal by Implication" Where Title IX Was Intended To Expand Available Rights and Remedies.

The rights that Petitioners seek to assert under Section 1983 are pre-existing constitutional rights, that were protected through Section 1983 remedies prior to Title IX enactment. Congressional intent in enacting Title IX was to expand the rights and

remedies available to redress sex discrimination by federally-funded educational institutions. Title IX did not "repeal by implication" the use of Section 1983 remedies to enforce constitutional rights.

Petitioners have not invoked Section 1983 remedies to redress violations of rights that were *created by* Title IX. As this Court has stated, where rights were created by a later statute,

> "there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing v. Freestone,* 520 U.S. 329, 341, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right. See *ibid.; Smith v. Robinson,* 468 U.S. 992, 1012, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984).

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005) ("*Rancho Palos Verdes*").

In *Rancho Palos Verdes,* the question before the Court was whether Section 1983 remedies were available to enforce "newly created" statutory rights, under the Telecommunications Act of 1996, 110 Stat. 56 ("TCA"). Congress enacted TCA to reduce "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." 544 U.S. at 115. TCA amended the Communications Act of 1935, 48 Stat. 1064, to provide that local governments may neither "unreasonably discriminate among providers of functionally equivalent services" for wireless communications, 47 U.S.C. § 332(c)(7) (B)(i)(I), nor take actions that "prohibit or have the effect of prohibiting the provision of personal wireless services," § 332(c)(7)(B)(i)(II), nor take actions that

limit the placement of wireless facilities "on the basis of the environmental effects of radio frequency emissions," § 332(c)(7)(B)(iv). TCA also created a specific remedy for enforcement of these rights. 47 U.S.C. § 332(c)(7) (B)(v).

Clearly, these were "newly created" statutory rights. 544 U.S. at 120. Without the TCA, no provider of wireless services could have made a tenable claim that it had a pre-existing constitutional or statutory right that was violated if, for example, a local government limited the placement of wireless facilities based on environmental concerns. Indeed, the Court's decision in *Rancho Palos Verdes* was that TCA "*creates* individually enforceable rights" that did not exist prior to the enactment of the statute. 544 U.S. at 120-121 (emphasis added).

Similarly, in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 20 (1981) ("*Sea Clammers*"), the Court addressed whether Section 1983 remedies were available to enforce newly created statutory rights under two environmental acts—the Federal Water Pollution Control Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 et seq. (1976 ed. and Supp. III)("FWPCA"), and the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052, as amended, 33 U.S.C. § 1401 et seq. (1976 ed. and Supp. III)("MPRSA"). The rights that plaintiffs sought to enforce did not exist prior to the enactment of those statutes, which created comprehensive federal regulation of discharge of waste and dumping of materials into ocean waters near the United States coastline, and which also created "unusually elaborate enforcement provisions." 453 U.S. at 13. Without FWPCA and

MPRSA, the claims that were asserted in *Sea Clammers* could not have been brought.

In both *Rancho Palos Verdes* and *Sea Clammers,* the Court held that the comprehensive remedial schemes provided by the new acts precluded the use of Section 1983 remedies to enforce statutory rights *newly created* by those acts. But the Court did not hold that the statutes at issue there made Section 1983 unavailable to redress pre-existing constitutional rights. To the contrary, in *Rancho Palos Verdes,* the Court made clear that "the claims available under § 1983 prior to the enactment of the TCA continue to be available after its enactment." 544 U.S. at 126.

In contrast to *Rancho Palos Verdes* and *Sea Clammers*, the constitutional claims that Petitioners filed under Section 1983 could have been brought had Title IX not been enacted. As the Eighth Circuit held in *Crawford v. Davis,* 109 F.3d 1281, 1283 (8th Cir. 1997), in holding that Title IX did not preclude Section 1983 remedies for constitutional claims:

> To the extent that Ms. Crawford's § 1983 claims are premised on alleged violations of the Equal Protection Clause, we believe that the application of *Sea Clammers* to her claims is plainly inapposite. *Sea Clammers* in no way restricts a plaintiff's ability to seek redress via § 1983 for the violation of independently existing constitutional rights, even if the same set of facts also gives rise to a cause of action for the violation of statutory rights.

Because the constitutional claims which Petitioners filed under Section 1983 could have been brought had Title IX not been enacted, preclusion of

those claims by Title IX would result in "repeal by implication" of the protections of Section 1983. Justice Alito, in an opinion for the Court last year, outlined the stringent standard that applies to any claim of "repeal by implication":

> While a later enacted statute ... can sometimes operate to amend or even repeal an earlier statutory provision ... , "repeals by implication are not favored" and will not be presumed unless the "intention of the legislature to repeal [is] clear and manifest." ... We will not infer a statutory repeal "unless the later statute 'expressly contradict[s] the original act'" or unless such a construction "is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all."

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, __ U.S. __, 127 S.Ct. 2518, 2532 (2007) (citations omitted)

As Justice Scalia stated in his opinion for the Court in *Branch v. Smith*, 538 U.S. 254, 273 (2003),

> An implied repeal will only be found where provisions in two statutes are in "irreconcilable conflict," or where the latter Act covers the whole subject of the earlier one and "is clearly intended as a substitute."

538 U.S. at 273, quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936).

A repeal by implication should only be found where the two statutes "cannot mutually coexist" because of a "positive repugnancy" between their provisions. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143 (2001) ("*J.E.M. Ag*

Supply"), quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

As Justice Thomas stated for the Court in *J.E.M. Ag Supply,*

> "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

534 U.S. at 143-144, quoting *Morton v. Mancari,* 417 U.S. 535, 551 (1974).

In determining whether Section 1983 remedies that were available before the passage of Title IX to protect constitutional rights will continue to be available for that purpose, the application of a standard less stringent than the "irreconcilable conflict" or "positive repugnancy" standard would permit courts more readily to find a repeal by implication of Section 1983 than of, *e.g.,* patent laws,[7] environmental laws,[8] reapportionment laws,[9]

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[7] *J.E.M. Ag Supply,* 534 U.S. at 143-144 (because of no "irreconcilable conflict," Plant Variety Protection Act, 7 U.S.C. § 2321 *et seq.,* which provided special provisions for patentability of plants did not preclude issuance of utility patents for plants under general patent laws).

[8] *National Ass'n of Home Builders v. Defenders of Wildlife,* 127 S.Ct. at 2532-2533 (Section 7(a)(d) of Endangered Species Act, 16 U.S.C. § 1531 *et seq.,* which requires that federal agencies take steps to ensure that their actions do not jeopardize endangered species, did not impliedly repeal, or add tenth criterion onto, statutory mandate of Clean Water Act, 33 U.S.C. § 1251 *et seq.* that Environmental Protection Agency transfer its permitting authority to a State if nine statutory criteria are met, because there was no "irreconcilable conflict" between the statutes).

[9] *Branch v. Smith,* 538 U.S. at 273 (statute mandating single-member districts did not repeal by implication provision of

and securities laws.[10] Finding a repeal by implication is, as it should be, a "rarity." *J.E.M. Ag Supply,* 534 U.S. at 142, quoting *Matsushita Elec. Indus. Co., Ltd. v. Epstein,* 516 U.S. at 381.

In considering whether there has been a repeal by implication, the Court has also taken note of the purposes of both statutes. Where the purported repeal by implication would undermine the statutory purpose of the prior statute, the review is heightened. Thus, in *Cook County, Ill. v. U.S. ex rel. Chandler,* 538 U.S. 119 (2003) ("*Cook County*"), the Court rejected an argument that amendments to the False Claims Act, 31 U.S.C. §§ 3729-3733, had impliedly exempted municipalities from liability under the Act. Justice Souter, for a unanimous Court, stated,

> It is simply not plausible that Congress intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting false claims.

538 U.S. at 133-134.

There is no "positive repugnancy" or "irreconcilable conflict" between the availability of Title IX remedies to enforce statutory rights under Title IX, and the availability of Section 1983

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federal reapportionment statute providing for at-large elections in certain circumstances).

[10] *Matsushita Elec. Indus. Co., Ltd. v. Epstein,* 516 U.S. 367, 381 (1996) (provision of Securities Exchange Act which confers exclusive jurisdiction upon federal courts for suits arising under Act did not partially repeal by implication Full Faith and Credit Act for purposes of determining whether federal courts should give preclusive effect to a state court judgment incorporating settlement agreement dismissing claims arising under Securities Exchange Act).

remedies to redress violations of the Equal Protection Clause, even when the operative facts are the same. Just as Title VI remedies to enforce Title VI rights have co-existed with Section 1983 remedies to enforce rights under the Equal Protection Clause, even when the operative facts are the same, Title IX can co-exist with Section 1983. Indeed, for more than a decade, the Courts of Appeals of the Sixth, Eighth, and Tenth Circuits have found no preclusion and have permitted both Title IX claims and Section 1983 claims to be asserted based on the same operative facts, with no untoward results.[11]

3. Section 1983 Remedies Should Not Be Precluded Where The Administrative Scheme Of Title IX Is Insufficient For Protection Of Constitutional Rights.

In Title IX, the only enforcement mechanism that is specifically provided is an administrative procedure for the termination of federal financial support to educational institutions violating Title IX. *Cannon,* 441 U.S. at 683; see also 20 U.S.C. § 1682. An individual can neither compel the government to conduct an investigation nor participate in the administrative process. She cannot present evidence, advocate her case in front of any administrative body, or participate in, agree to, or challenge the voluntary resolution process. *Cannon,* 441 U.S. at 706 n. 41. Clearly, the administrative scheme renders Title IX incomplete for purposes of fully protecting and enforcing the constitutional rights of an individual, *Cannon,* 441 U.S. at 705, and lacks the comprehensive features the Court has

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[11] *Lillard v. Shelby County Bd. Of Educ.*, 76 F.3d 716 (6th Cir. 1996); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996).

held indicate a congressional intent to bar remedies. *Blessing,* 520 U.S. at 347; see also *Sea Clammers,* 453 U.S. at 20.

In those few cases in which the Court has found an administrative and judicial mechanism sufficient to preclude the availability of remedies under Section 1983 for newly created statutory rights, it has been the detailed *statutory administrative process,* either by itself or in combination with related judicial remedies—that the Court found incompatible with the invocation of remedies under Section 1983 to protect those newly created rights. Thus, in *Sea Clammers,* the Court noted:

> These Acts contain unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens. The FWPCA, for example, authorizes the EPA Administrator to respond to violations of the Act with compliance orders and civil suits. § 309, 33 U.S.C. § 1319. ... States desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement. § 402(b)(7), 33 U.S.C. § 1342(b)(7). In addition, under § 509(b), 33 U.S.C. § 1369(b), "any interested person" may seek judicial review in the United States courts of appeals of various particular actions by the Administrator .... Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement. § 1369(b)(2).

453 U.S. at 13-14. Under this analysis, allowing Section 1983 claims to enforce the statutory rights that were newly created by the FWPCA or the MPRSA could have permitted plaintiffs to sidestep the detailed statutory schemes, including the administrative use of compliance orders and a mechanism for authorizing States to conduct their own permit programs. Further, permitting Section 1983 claims to be filed in the district courts to enforce these newly created statutory rights would have been inconsistent with the direct review of administrative action by the courts of appeals.

In contrast is the history of *Smith v. Robinson,* concerning pre-existing rights. In *Smith v. Robinson,* the statutory administrative process under the Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq. ("EHA") was equally elaborate:

> the [EHA] establishes an elaborate procedural mechanism to protect the rights of handicapped children. The procedures not only ensure that hearings conducted by the State are fair and adequate. They also effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review. §§ 1412(4), 1414(a)(5), 1415. See also S.Rep. No. 94-168, at 11-12 (emphasizing the role of parental involvement in assuring that appropriate services are provided to a handicapped child); id., at 22; *Board of Education of Hendrick Hudson Central School Dist. v. Rowley,* 458 U.S. [176,], 208-209 [(1982)].

468 U.S. at 1010-1011. The Court concluded that permitting Section 1983 remedies to redress the rights at issue in *Smith v. Robinson* would undermine the EHA's carefully tailored administrative process. The Court concluded that, by Congress's inclusion of an express private right of action in the EHA and its requirement of exhaustion of a comprehensive enforcement scheme before bringing suit, Congress must have intended that the EHA be the only means by which plaintiffs could enforce their right to a free and appropriate education.

The Court thus held that the EHA precluded claims under Section 1983 to redress denial of equal protection, because such constitutional claims would be "inconsistent with", 468 U.S. at 1012, the EHA's "carefully tailored administrative and judicial mechanism," 468 U.S. at 1009. In finding a "repeal by implication", through the replacement of one statutory remedy with another, the Court stated:

> We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim. ... Nevertheless, § 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. The crucial consideration is what Congress intended.

468 U.S. at 1012 (citations omitted).[12] In his dissent, Justice Brennan (joined by Justices Marshall and Stevens) criticized the Court for not applying the well-established standard that a repeal by implication should only be found "to the extent necessary to resolve clear repugnancy between statutes." 468 U.S. at 1026.

Congress addressed these conclusions by amending the EHA through the Handicapped Children's Protection Act of 1985, 20 U.S.C. §1415 ("HCPA"). As its legislative history makes clear, Congress had intended that the EHA to supplement existing remedies, and had not intended the EHA's comprehensive enforcement scheme to supplant Section 1983 remedies:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be

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[12] The Court added a caveat with this footnote: "There is no issue here of Congress' ability to preclude the federal courts from granting a remedy for a constitutional deprivation. Even if Congress repealed all statutory remedies for constitutional violations, the power of federal courts to grant the relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available in cases within their jurisdiction." 468 U.S. at 1012 n.15 (citations omitted).

> exhausted to the same extent as would be required had the action been brought under this subchapter.

P.L. 99-372(1986), codified at 20 U.S.C. § 1415(l).

Congress made the amendment retroactive, such that this Court's holding in *Smith v. Robinson* never had effect. In so doing, Congress made a strong statement that this civil rights statute was intended to complement rather than preclude the use of existing rights and enforcement mechanisms.

In contrast to the TCA, the FWPCA and MPRSA, and the EHA, there is no express private right of action, comprehensive remedial scheme, or exhaustion requirement in Title IX. A judicial recognition of an implied private right of action, of course, does not carry with it any of the aspects of a comprehensive administrative scheme developed by Congress that this Court has found incompatible with the availability of Section 1983 remedies to vindicate statutory rights.

This Court has developed an extensive jurisprudence surrounding Section 1983 and the Equal Protection Clause. Prior to the enactment of Title IX, this Court held that sex discrimination violated the Equal Protection Clause. *Reed v. Reed,* 404 U.S. 71 (1971). Further, both before and after enactment of Title IX, the lower courts recognized that Section 1983 provided a remedy for constitutional claims of sex discrimination in violation of the Equal Protection Clause, *Johnson v. City of Cincinnati,* 450 F.2d 796 (6th Cir. 1971); *Bray v. Lee,* 337 F. Supp. 934 (D. Mass. 1972). This Court has so held in education cases such as this one. *United States v. Virginia,* 518 U.S. 515 (1996); *Mississippi University for Women v. Hogan,* 458 U.S.

718 (1982). Congress's enactment of Title IX certainly did not supplant this jurisprudence.

Section 1983 remains the only means by which plaintiffs can hold state actors accountable for violations of their constitutional rights. Unlike the telecommunications statute in *Rancho Palos Verdes* or the environmental statutes in *Sea Clammers,* the Constitution does not set out private enforcement mechanisms of any kind. Section 1983 is used every day in courts throughout the nation for this purpose. Accordingly, to paraphrase this Court's statement in *Cook County,* 538 U.S. at 133-134, "It is simply not plausible that Congress intended to lessen remedies to redress sex discrimination *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting such discrimination."

CONCLUSION

For the foregoing reasons, the American Bar Association, as *amicus curiae,* respectfully requests that this Court **reverse** the decision below.

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Respectfully submitted,

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